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U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br><br>Plaintiff - Appellee,<br><br>v.<br><br>JUAN JOSE RIZO-HERNANDEZ,<br><br>Defendant - Appellant. | No. 04-10512<br><br>D.C. No. CR-03-00509-WBS<br><br>MEMORANDUM[*] |

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Submitted March 8, 2006[**]

Before: CANBY, BEEZER, and KOZINSKI, Circuit Judges.

Juan Jose Rizo-Hernandez appeals from his jury trial conviction for being a deported alien found in the United States, in violation of 8 U.S.C. § 1326, and his 100-month sentence. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm his conviction and vacate and remand the sentence.

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[**] This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Rizo-Hernandez first contends that the trial court violated his Confrontation Clause rights by admitting a "warrant of deportation" and a "certificate of nonexistence" because they are testimonial documents and violate *Crawford v. Washington*, 124 S. Ct. 1354 (2004). This issue has been foreclosed by *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1074-75 (9th Cir. 2005) (holding that a warrant of deportation was nontestimonial), and *United States v. Cervantes-Flores*, 421 F.3d 825, 830-34 (9th Cir. 2005) (holding that a certificate of nonexistence is nontestimonial evidence and does not violate the Confrontation Clause).

Next, Rizo-Hernandez contends that his prior felony conviction should have been pled in the indictment and proven to a jury, and that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), is no longer good law. This issue is foreclosed. *See United States v. Velasquez-Reyes*, 427 F.3d 1227, 1229 (9th Cir. 2005); *see also United States v. Weiland*, 420 F.3d 1062, 1079 n.16 (9th Cir. 2005) (holding that we are bound to follow *Almendarez-Torres*, even though it has been called into question, unless it is explicitly overruled by the Supreme Court).

Next, Rizo-Hernandez contends that the government provided insufficient evidence to demonstrate that his prior conviction for sale of methamphetamine, in violation of California Health & Safety Code § 11379(a), should be classified as

an "aggravated felony" for purposes of a sentencing enhancement. We agree. Because the statute of conviction is broader than the definition of a "controlled substance offense," *see United States v. Navidad-Marcos*, 367 F.3d 903, 907-08 (9th Cir. 2004), and the judicially noticeable documents relied upon by the court did not unequivocally establish that Rizo-Hernandez was convicted of a drug trafficking offense under U.S.S.G. § 2L1.2(b)(1)(A), *see Shepard v. United States*, 125 S. Ct. 1254, 1263 (2005), the district court erred in applying the 16-level enhancement. "The government will have the opportunity at re-sentencing to offer additional judicially-noticeable evidence to support the enhancement." *Navidad-Marcos*, 367 F.3d at 909.

Accordingly, we **AFFIRM** the conviction, **VACATE** the sentence, and **REMAND** for resentencing.